PUBLIC BANK BERHAD

v.

HARA INDUSTRIES SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. 7652 OF 1985]
16 SEPTEMBER 1986

CIVIL PROCEDURE: *Interest on judgment debt - Extent of jurisdiction of the Court to award interest on judgment sums - Plaintiff bank awarded interest at 9% per annum from judgment date until realisation - Courts of Judicature Act 1964 - Section 16 - Rules of the High Court 1980 - Order 42 r. 12 - Ceiling to rate of interest on judgment debt 8% per annum - Slip rule - Application to set aside judgment.*

The primary issue in this application to set aside a judgment entered in default of appearance turned on the question of the extent of the jurisdiction of the Court to award interest on judgment sums.

The plaintiff bank claimed RM15,473,42 said to be the amount outstanding on an overdraft account "inclusive of interest as at 26 September 1985" and a further amount of RM73,677.40 said to be the amount outstanding in respect of trust receipts "inclusive of interest as at 26 September 1985" and prayed judgment for these amounts together with interest thereon calculated at 9% from the 27 September 1985 until realisation. Upon default of appearance judgment as prayed was entered against the 1st defendant.

Held:

[1] Order 42 r. 12 of the Rules of the High Court 1980 prescribes that every judgment debt shall carry interest at the rate of 8% per annum or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied. This Rule has no general application being restricted to judgment debts only and only for the period from the date of judgment until realisation. It makes no distinction between debts in respect of which the parties have an agreement in respect of interest and those where there is no such agreement.

[2] The award of 9% interest up to date of realisation prayed for and given was beyond the jurisdiction of the Court to give. This was not as a result of clerical error or slip that could have been corrected pursuant to O. 20 r. 11 and in any event no attempt to effect any correction had been made. If the plaintiffs enter judgment in default for more than the sum actually due and do not (or cannot) correct the error, the defendant is entitled *ex debito justitiae* to have the judgment set aside.

[3] Order 13 r. 8 under which the application was brought does give the Court the power to vary the default order it made instead of setting it aside. Variation of the order would always be made if application to do could be and is made under the slip rule or even if the error is not one that would come within the compass of the slip rule where the plaintiff applies to correct the error or even where the defendant applies to have the judgment set aside on the grounds that judgment was entered in excess of what the plaintiff was entitled to provided that the plaintiff concedes the error and gives an acceptable explanation as to how the error came about.

[4] In the instant case the plaintiff resisted the defendant's application and in all the circumstances the Court had no choice but to have the default judgment set aside.

[Judgment set aside with costs.]

Cases referred to:
London, Chatham & Dover Railway Co. v. South Eastern Railway Co. [1893] AC 429
Page v. Newman 9 B & C 378
Armitage v. Parsons [1908] 2 KB 410
Hughes v. Justin [1894] 1 QB 667

Legislation referred to:
Courts of Judicature Act 1964, ss. 16, 17, 25
Rules of the High Court 1980, O. 42 r. 12, O. 40 r. 11, 11(1), (2)
Civil Law Act 1956, s. 11, 11(b)

For the defendant/applicant - Koo Patrick; M/s. Wong Som Nuck & Co.
For the plaintiff/respondent - Juliana Soloman; M/s. Rashid & Lee

JUDGMENT

VC George J:

The primary issue in this application to set aside a judgment entered in default of appearance turned on the question of the extent of the jurisdiction of the Court to award interest on judgment sums.

The plaintiff bank claimed RM15,473.42 said to be the amount outstanding on an overdraft account "inclusive of interest as at 26 September 1985" and a further amount of RM73,677.40 said to be the amount outstanding in respect of trust receipts "inclusive of interest as at 26 September 1985" and prayed judgment for these amounts together with interest thereon calculated at 9% from the 27 September 1985 until realisation. The rate and the basis of the imposition of interest up to 26 September 1985 and the basis for seeking interest at 9% per annum from the 27 September 1985 were not disclosed. Upon default of appearance judgment as prayed was entered against the 1st defendant.

In *London , Chatham & Dover Railway Co. v. South Eastern Railway Co.* [1893] AC 429 Lord Herschell LC at 439 and Lord Watson at 441 accepted as the common law rule in respect of the awarding of interest that which was laid down by Lord Tenterden LC in *Page v. Newman* 9 B & C 378. The rule was that interest could be ordered to be paid by the Court where there was express agreement to pay interest or where an agreement to pay interest could be implied. But it would appear that interest was to be calculated only up to the date of judgment. There were no provisions or practice at common law for awarding interest on judgment debts. In England judgment debts did not carry interest until statutory provisions for that purpose were enacted.

In Malaysia s. 16 (read with s. 17) of the Courts of Judicature Act 1964 provides for rules of Court to be made by the Rules Committee for the various purposes set down in s. 16, one of which is item (i) therein which is in respect of the regulating of the rate of interest payable *inter alia* on all debts including judgment debts. There is a proviso to this item which is as follows:

> Provided that no case shall any rate of interest exceed eight per centum per annum, unless it has been otherwise agreed between parties.

Section 16 is an enabling provision and the proviso to item (i) prescribes a ceiling to the rate of interest that the Rules Committee may allow the Courts to award. The ceiling is 8% per annum. However, the proviso makes it clear that the Rules Committee are not bound by the ceiling of 8% per annum in cases where the parties have an agreement in respect of the rate of interest payable. Where the parties do not have an agreement in respect of interest the 8% per annum rate was the maximum that the Rules Committee could prescribe. It could prescribe a lesser rate. But where there was an agreement in respect of the rate of interest between the parties, there was no clog to the Rules Committee's discretion. They could prescribe any rate of interest they chose. It could be less than 8% or more than 8%. It could be at the rate at which the parties had their agreement or for that matter at even a higher rate than that.

It is also to be noted that by item (i) the Rules Committee could prescribe rates of interest in respect of all debts including judgment debts and for any period whether before or after judgment.

However, the only existing rule made pursuant to item (i) is r. 12 to O. 42 of the Rules of the High Court which reads as follows:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.

It is to be noted that this Rule has no general application being restricted to judgment debts only and only for the period from the date of judgment until realisation. It makes no distinction between debts in respect of which the parties have an agreement in respect of interest and those where there is no such agreement.

Per se s. 16 does not give the Courts any power to award interest. Without rules made thereunder the section provides no power to the Courts. Thus the only power that the Courts have pursuant to s. 16 is that given to them by the only rule made thereunder which exists which is O. 42 r. 12 which as has been seen is pretty limited in scope.

However, in spite of the limited application of O. 42 r. 12 it has been the practice of the Courts to award interest on the whole or any part of a debt for the whole or any part of the period between the date that the cause of action arose and the date of judgment. This could always have been done by virtue of the common law but is now done pursuant to s. 11 of the Civil Law Act of 1956 which reads as follows:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of arose and the date of the judgment cause of action arose and the date of the judgment:
>
> Provided that nothing in this section-
>
> (a) shall authorise the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

It is to be noted that s. 11 read without the provisos gives the Court an unfettered discretion to award interest but only for the period between the date the cause of action arose and the date of judgment. It is also to be noted that the effect of proviso (b) is that in respect of

any debt upon which interest is payable as of right e.g. by virtue of an agreement between the parties, odd as it may at first sight seem, the wide discretion given to the Courts by the section is taken away. However the Courts have not hesitated to award interest on debts or damages for the period between the date that the cause of action arose and the date of judgment even in cases caught up by proviso (b). It has to be presumed that the Courts had fallen back on the common law in doing this. Where the parties had an agreement in respect of the rate of interest the Courts have always awarded interest on those agreed terms for the period between the date when the cause of action arose and the date of judgment unless there were other statutory prohibitions from doing so in particular cases as in the cases caught up by the provisions of the Moneylenders Act.

My attention was drawn to item 7 to the Schedule to the Courts of Judicature Act which purports to give to the Courts a general discretionary power to direct that interest be paid on debts including judgment debts. However, this item does not provide any help to the plaintiff in that the proviso to s. 25 of the Act provides that those additional powers given to the Courts including the said item 7 are only to be exercised in accordance with any written law or Rules of Court.

The predecessor to the Rules of the High Court 1980 was the Rules of the Supreme Court 1957 in which O. 40 r. 11 was the rule pertaining to the award of interest. In sub-rule (1) to r. 11 the whole of the provision of s. 11 of the Civil Law Act was re-enacted (as it were) to cover the period between the date the cause of action arose and the date of the judgment in respect of debts or damages in respect of which interest was not payable as of right. There was a sub-rule (2) which covered all judgments for the payment of money and prescribed that Judgment debts "shall bear interest at the rate of 6% per annum". It is not difficult to see that the position that obtained in respect of interest when the Rules of the Supreme Court 1957 were in force was no different to the current position. It does however provide some emphasis for the view that in respect of judgment debts the Rules Committee did not see the need then (as it does not see the need now) to make a distinction between debts in respect of which the parties have an agreement in respect of the rate of interest to be paid and those that have no such agreement. Whether it was a debt of the former or latter kind, then, when the Rules of the Supreme Court 1957 was in force and now, with the Rules of the High Court 1980 in force, all the Courts could award on judgment debts from the date of judgment until realisation was 6% and 8% respectively.

The award of 9% interest up to date of realisation prayed for and given was beyond the jurisdiction of the Court to give. This was not as a result of clerical error or slip (as was the case in *Armitage v. Parsons* [1908] 2 KB 410 that was cited) that could have been corrected pursuant to O. 20 r. 11 and in any event no attempt to effect any correction had been made. If the plaintiffs enter judgment in default for more than the sum actually due and do not (or cannot) correct the error, the defendant is entitled *ex debito justitiae* to have the judgment set aside (*Hughes v. Justice* [1984] 1 QB 667). Order 13 r. 8 under which the application was brought does give the Court the power to vary the default order it made instead of setting it aside. Variation of the order would always be made if application to do so could be and is made under the slip rule or even if the error is not one that would come within the compass of the slip rule where the plaintiff applies to correct the error or even where the defendant applies to have the judgment set aside on the grounds that judgment was entered in excess of what the plaintiff was entitled to provided that the plaintiff concedes the error and gives an acceptable explanation as to how the error came about.

In the instant case the plaintiff resisted the defendants' application and in all the circumstances the Court had no choice but to have the default judgment set aside. It was set aside with costs.

The 1st defendants had also contended that the judgment entered was irregular in that there was no due service of the writ on the 1st defendants. The service was purported to have been effected at what was said to the registered office of the 1st defendants at Suite 1703, 17th Floor, Wisma Lim Foo Yong, No. 86 Jalan Raja Culan, Kuala Lumpur by AR registered post on 28 December 1985. The plaintiffs had relied on a search they had caused to be made at the Companies' Registry which showed that the registered office of the 1st defendant as at 16 June 1983 was at the Wisma Lim Foo Yong address.

For the 1st defendant in support of the application to set aside the judgment it was contended by the affidavit of one of its directors, Haji Abdul Razak bin Abdul Majid, affirmed on 20 January 1986 that the registered office is a "Suite 805, 8th Floor ENE Plaza, Jalan Pudu, Kuala Lumpur". The result of a "search" was exhibited. However neither the affidavit of Haji Abdul Razak nor the search exhibited by him demonstrates that the registered office was not as at the date that the writ was posted to the 1st defendants at the address shown in the search made on behalf of the plaintiffs.

The 1st defendants did not succeed in satisfying me that due service of the writ had not been effected. Clearly as at 16 January 1983 the registered office of the 1st defendant was at Wisma Lim Foo Yong. Haji Abdul Razak's affidavits and the result of the search exhibited by him reveal that as at 20 January 1986 the registered office was at ENE Plaza. He does not say when the change took place and accordingly just as the plaintiffs had appeared to have done, the Court also had to and relied on the results of the search made on behalf of the plaintiffs and concluded that on the date the service of the writ was effected the registered office of the 1st defendant was at the Wisma Lim Foo Yong address.

Also found at [1987] 1 CLJ 399